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No. 02-

IN THE
Supreme Court of the United States

KEVIN DEMBINSKI,

Petitioner,

v.

VOUGHT AIRCRAFT INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. WARE CORNELL, JR.
Counsel of Record
ARIANNE BOMBALIER SUAREZ
CORNELL & ASSOCIATES, P.A.
Attorneys for Petitioner
1401 E. Broward Boulevard
Suite 204
Fort Lauderdale, FL 33301
(954) 524-2703

175311

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Where an employer discloses an employee's confidential medical record in violation of 42 U.S.C. § 12112(d) of the Americans with Disabilities Act, is the employee required to establish a "tangible injury in fact" in order to defeat a motion for summary judgment and in order to sustain a claim under this subsection of the ADA?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. The underlying lawsuit was originally filed against Northrop Grumman Corporation, which was subsequently substituted by Vought Aircraft Industries as a Defendant.

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Appendix B — Order On Defendant's Motion For Summary Judgment And Final Judgment Of The United States District Court For The Southern District Of Florida Dated And Filed September 20, 2001 ..... 3a

Petitioner, Kevin Dembinski, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The judgment of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion of the district court in this case is reproduced at 2a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of the Americans with Disabilities Act, ("ADA") is set forth below:

> Sec. 12112. — Discrimination
>
> **(a)** General rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> * * *

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of

such applicant, and may condition an offer of employment on the results of such examination, if —

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that —

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

* * * *

STATEMENT OF THE CASE

Kevin Dembinski ("Dembinski") has been diagnosed with Post Polio Syndrome, which is related to an injury he received in January 1999 when he was in France on business for Northrop Grumman Corporation.

Dembinski continued doing some work from his home in Stuart, Florida as he was undergoing tests at local medical facilities in Stuart, Florida under Florida Workers' Compensation, which was designated by the company, when Dembinski was injured. Dembinski utilized sick time to offset visits to medical and physical therapy facilities. He worked at home in order to assist NGC/Vought in its pursuit of a number of programs with customers, such as General Electric Aircraft Engines, Airbus Industrie, Pratt & Whitney and Aircelle. Dembinski worked with Mr. Vernon Broomall and others on the NGC/Vought staff to arrange customer visits, make contracting and pricing decisions, and he performed the essential functions of the Director of Business Development position as listed in the Position Responsibilities and Specific Responsibilities section of the Performance Management Process-Individual Performance evaluation dated 1/98.

Dembinski was notified in March 1999 by Vought of being placed on medical leave. At this time, he continued to provide competitive intelligence, support in writing presentations, and he set up customer visits and meetings. He performed these activities to demonstrate that he was still an asset to the company with the hope that Vought would reconsider accommodation of his condition. Vought acknowledged Dembinski's work contribution by paying him upon his request.

Dembinski was able to perform the essential functions of his job. Nowhere in the NGC "Performance Management Process-Individual Performance Evaluation" document's listing of position and specific responsibilities description does it explicitly state that extensive travel is an essential function. The Director of Business Development position is a supervisory position in nature. Dembinski elected to participate directly in customer interfaces, which required travel, but it was at his own option, since he could have, and often did send subordinates to these meetings. In fact, during the trip in which Dembinski was injured, he was not originally scheduled to go. A subordinate, Mr. Kevin Knowles, was originally scheduled, but he decided to resign, and Mr. Broomall directed Dembinski to take his place. Although in the past Dembinksi did travel, with the change in the company's strategic initiative since that time not to pursue Airbus Industries and to drop its strategic alliance with French company Hispano-Suiza, the amount of travel for this job would have greatly decreased.

As Broomall described Dembinski's position in his deposition, he stated that "one very important aspect to me is beyond knowing people, knowing the industry, being able to collect information, is organizing the information to make sense out of it and then forming it into a strategy to act upon it". Broomall also stated "so the most valuable marketing people to me are people who can find out the information and then figure out correctly what to do about it, which results in new business".

The performance of the above essential functions do not require extensive travel or working out of Dallas. In addition, with an NGC/Vought facility within five (5) miles of Dembinski's home with teleconferencing capabilities and use

of the internal mail system and internet, Dembinski was able to perform the essential functions of his position, interacting regularly with corporate management in Dallas as well as with customers.

Vought did not engage in an interactive process with Plaintiff when he requested a reasonable accommodation in writing in an email dated 5/13/99. Dembinski's request was only addressed in writing by Vought's letters dated 4/27/99 and 5/26/99, and Dembinski was given no input into the process. Vought did not interact directly with Dembinski at all and did not ask for any input from Dembinski. In addition, after learning of the acquisition of NGC's Commercial Aircraft Division by the Carlyle Group (which led to the establishment of Vought Aircraft Industries), Dembinski wrote a letter to the president, Mr. Gordon Williams, requesting that NGC/Vought reconsider its position regarding accommodation. This was an effort to engage the company in developing a reasonable accommodation that would benefit both parties and eliminate the need for legal redress. Again, there was no response from the company and no acknowledgment of receiving this request. There were no discussions of job restructuring, alternate assignments or telecommuting, either on a temporary or permanent basis. Broomall stated in his deposition on 11/7/00 that "we have a position called strategic planner that goes beyond just the marketing aspect into the whole business plan for the organization". However, Dembinski was never considered by Broomall for this position, despite his assessment that "He [Mr/. Dembinski] has strong market intelligence and strategies".

In 1999, Dembinski applied for the Director-Customer Requirements position located in the NGC/Vought facility in Melbourne, FL, which was denied. The company contended in its Motion for Summary Judgment that "Dembinski did not meet the minimal qualifications for the position because he did not have the requisite experience in software/systems products". However, the position description as stated in the Company's *Horizons Career Opportunities* paper dated 3/29/99 did not specify any such requirement; software and/or systems knowledge or experience is not listed as a qualification for the position. The further contention as stated in Vought's Motion for Summary Judgment that "Dembinski also did not meet the minimal qualifications for the other positions because Joint STARS is a specialized military aircraft program and the positions required previous related-type experience, which Dembinski lacked" was incorrect.

Dembinski testified that he has extensive experience selling military hardware to various international customers. During his time as the Director of Marketing-Aerostructures with Grumman Corporation, Dembinski was responsible for marketing the S2-T, a data bus 1553-compatible ASW system. He worked with the U.S. Navy to develop presentations for a number of foreign customers, including Brazil, Turkey and Greece. In addition, Dembinski was instrumental in capturing the V-22 empennage program and C-17 control surfaces subcontracts. These programs required extensive interface with Congressional representatives and all the armed services associated with each program. In 1997, Mr. Alex Zakreski (Vice President, Business Development) offered Dembinski the position of Director of Business Development in the Melbourne Division. He was unable to select Dembinski for the position because top management wanted Dembinski to

remain with the Commercial Aircraft Division and relocate to Dallas. Therefore, to say that Dembinski was unqualified for military programs was not factual and a total distortion of the situation. Coincidentally, the *Horizons Career Opportunities* website as of 8/3/01 still showed a Director-Program Development position as unfilled.

Dembinski was directed by Ms. Dee Robinson, the Human Resources Representative, to file a formal request for reasonable accommodation in accordance with Corporate Procedure H112. Dembinski's email of 5/13/99 is this request, and it states "I hereby request that a Reasonable Accommodation Committee (RAC) meeting be convened to allow me to be assigned to the Stuart facility until I am released from medical limitations. In accordance with Corporate Procedure-Reasonable Accommodation-H112, I would like an input to this review to provide actual evidence that would have bearing on this decision-making process".

In a letter dated 4/27/99, Dee Robinson instructed Dembinski to have his doctor provide a letter specifying the duration of his injury. The doctor stated that it was impossible since there was not a firm diagnosis regarding his condition, and Dembinski was being referred to a specialist. Dembinski received a letter dated 5/26/99 from Robinson that stated "because your doctor has been unable to provide us with an anticipated duration for your medical instructions, the company must deny your request".

Broomall sent letters dated 5/28/99 to customers announcing that Dembinski was on medical leave without Dembinski's knowledge or consent. This created not only embarrassment, but also damaged Dembinski's reputation since this correspondence resulted in numerous questions to

Dembinski about his medical condition. It was especially troubling since a firm diagnosis was not available. Dembinski was unsure of his condition and was awaiting referral to a specialist at that time. The transfer of responsibility could have easily been made without reference to Dembinski's status or condition and putting personnel throughout the aerospace industry on alert. The *Working with Northrop Grumman: Employee Handbook* states that "Northrop Grumman will not release any information about you to external sources other than dates of employment and job titles.

Dembinski received a "60-Day Notice of Layoff" by letter dated September 20, 1999 from Broomall.

Broomall told Dembinski that his position had been eliminated. In an email dated 1/12/00 from Chris Wilt sent to BF Goodrich, Wilt wrote that "with the loss of Kevin Dembinski to Post-Polio Syndrome, I am now working Business Development for Nacelles and Commercial Programs for Northrop Grumman. You may recall that when you were last here I was the Boeing Nacelle Components Program Director . . .". Based on this email, Dembinski's position was not eliminated but given to another employee (Wilt) whose former position was actually eliminated when it was combined with larger Boeing program management within NGC/Vought. An NGC/Vought letter to employees from Paul Coco (Sector Vice President-Aerostructures) dated 11/18/99 lists Wilt as Director-Business Development with a position description markedly similar to the position that was "eliminated" for Dembinski. As of April 5, 2001, Wilt was still listed as the contact for Nacelle Systems at Vought per company website.

Vought's disclosure of Dembinski's medical condition benefited it because if Dembinski had obtained employment with any of Vought's competitors or customers (including BF Goodrich or GE Aircraft Engines), Dembinski would have enhanced that firm's competitive position against Vought. Vought would perceive Dembinski's intimate knowledge of its pricing, contractual agreements, technical capabilities as well as its corporate strengths and weaknesses, as adversely impacting its market position and ability to obtain new business. Employment references such as the one represented by Broomall's disclosure to a reference checking service, Allison & Taylor, effectively kept Dembinski from finding such alternate employment and benefitted Vought.

Dembinski's decision to hire a reference check company was not surreptitious as alleged by Vought. Before Dembinski hired the reference check company, Dembinski had participated in a number of positive interviews, but when Dembinski provided reference information which identified Broomall as his supervisor, he did not receive any further communication from those companies. Broomall told the Allison & Taylor representative, that "he has a long term disability" and is "unable to travel".

Dembinski has been deprived of the ability to seek and obtain employment, and he has suffered severe pain and suffering as a result of Vought's actions. Dembinski was a 26-year employee with Vought with an exemplary record, and he was referred by his supervisor, Broomall, as "unsurpassed in his knowledge of business development activities and the industry".

Dembinski filed the underlying action against Northrop Grumman Corporation, which was subsequently substituted by Vought Aircraft Industries ("Vought"), seeking relief under the Americans with Disabilities Act and the Texas Worker's Compensation Act. Dembinski subsequently amended his Complaint to add a disability disclosure claim under the ADA and an invasion of privacy claim under the Florida common law.

On July 13, 2001, Vought filed a Motion for Summary Judgment with respect to all claims and Dembinski filed his pleadings in opposition of said Motion. Vought filed its Reply to Dembinksi's opposition and on September 13, 2001, oral argument on the motion was held. On September 20, 2001, the District Court granted Vought's Motion for Summary Judgment on all claims.

The District Court found that Dembinski was not a qualified individual with a disability because he could not perform the essential functions of his position with or without a reasonable accommodation. The Court specifically found that travel and working from Dallas, Texas were essential job functions. The Court also found that Dembinski failed to resolve an "apparent inconsistency" with regard to his request for Social Security disability benefits and his position in this lawsuit. The District Court further found that Dembinski could not establish a legally-compensable injury regarding the disclosure in violation of the confidentiality provisions of the ADA.

On October 4, 2001, Dembinski filed a Motion for Reconsideration of the Order Granting Summary Judgment. On October 4, 2001, the Court denied this Motion, and this Order was entered on October 10, 2001. On October 30, 2001,

Dembinski filed his Notice of Appeal of the Order Granting Summary Judgment and of the Order Denying Dembinski's Motion for Reconsideration.

On April 25, 2002, the parties presented oral argument before the United States Court of Appeals for the Eleventh Circuit, and on May 7, 2002, the Eleventh Circuit Court of Appeals affirmed the District Court's Orders.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to define the remedy available for an employer's violation of 42 U.S.C. § 12112(d), the confidentiality provision of the Americans with Disabilities Act ("ADA"). The few federal circuit courts of appeals that have defined the remedy have unduly restricted the relief available to an employee whose medical record was illegally disclosed by his or her employer. By requiring proof of a tangible injury in fact, especially at the summary judgment stage of the case, the lower Courts in this case, and the federal circuit courts in the other cases construing this provision, have ignored the fact that the violation itself affects the employee's "terms, conditions, and privileges of employment" as outlined in 42 U.S.C. § 12112(a), and such a requirement eviscerates the purpose of the confidentiality provision of the ADA where an employer will have little incentive to uphold its obligation to treat its employees' medical information confidentially.

Where An Employer Discloses An Employee's Confidential Medical Record In Violation Of 42 U.S.C. § 12112(d) Of The Americans With Disabilities Act, The Employee Is Not Required To Establish A "Tangible Injury In Fact" In Order To Defeat A Motion For Summary Judgment And In Order To Sustain A Claim Under This Subsection Of The ADA

The District Court's opinion below, affirmed by the United States Eleventh Circuit Court of Appeals, eviscerates the protection afforded by the confidentiality provision of the ADA. By holding that an employee must establish a "tangible injury-in-fact" in order to survive a motion for summary judgment, despite the fact that it was undisputed that the employer violated the confidentiality provision, ignores the fact that the violation itself affects the employee's "terms, conditions, and privileges of employment" as outlined in 42 U.S.C. § 12112(a).

42 U.S.C. § 12112(d)(3)(B) provides in pertinent part that "information obtained regarding the medical condition or history of the applicant is [to be] treated as a confidential medical record".

The circuits that have thus far interpreted this provision of the ADA have determined that a plaintiff seeking to establish a violation of this section must demonstrate a tangible injury-in-fact.

In *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554 (5th Cir. 1998), one of the cases relied upon by the District Court, the employer violated the ADA by conducting a pre-employment medical inquiry of the prospective employee. The Fifth Circuit found that a violation of the prohibition against pre-employment medical examinations and inquiries, in and of itself, was not intended to give rise to damages liability.

In *Cossette v. Minnesota Power and Light*, 188 F.3d 964 (8th Cir. 1999), where the employer violated the same confidentiality subsection of the ADA that is at issue in this case, the Eighth Circuit determined that Cossette had to establish that MP & L's disclosure of Cossette's medical condition, its violation of the ADA, caused some sort of tangible injury. Although the Eighth Circuit reversed the grant of the summary judgment motion because it found that Cossette demonstrated a genuine issue of material fact that her employer's disclosure to a potential employer of her medical condition might have jeopardized her employment application, the Eighth Circuit still determined that it was necessary to establish such a tangible injury in order to prevail under this provision of the ADA.

Dembinski established that his employer disclosed, in an email to BF Goodrich, that he had Post Polio Syndrome, that his employer disclosed to approximately twenty-six (26) customers in the aerospace industry via correspondence in May 1999, without Dembinski's knowledge or consent, that Dembinski was on medical leave, that the disclosure not only caused embarrassment, but damaged Dembinski's reputation because the correspondence resulted in numerous questions to Dembinski about his medical condition, that he suffered severe pain and suffering due to Vought's actions, that the disclosure of Dembinski's medical condition benefited Vought because if Dembinski had obtained employment with any of Vought's competitors or customers (including BF Goodrich or GE Aircraft Engines), Dembinski would have enhanced that firm's competitive position against Vought, and that Dembinski had participated in a number of positive interviews, but when he provided reference information which identified the name of his supervisor, he did not receive any further communication from those companies

(Dembinski's supervisor had told a reference check company, that "he has a long term disability" and is "unable to travel"). The District Court determined that Dembinski did not establish an actual injury-in-fact, and therefore, could not recover for the violation of § 12112(d). (Appendix B).

By requiring a tangible injury in fact in *Armstrong*, 141 F.3d 554, 562 (5th Cir. 1998); *Griffin v. Steeltek, Inc.*, 160 F.3d 591 at 594-95 (10th Cir. 1998) and *Cossette*, these circuits have overlooked the statute's very prohibition against the disclosure of the confidential medical record and the statute's mandate that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment". 42 U.S.C. §§ 12112(a) and (d)(3)(B).

Although the *Armstrong* Court noted that the ADA is part of the same broad remedial framework as Title VII, it declined to provide relief for a proven violation of the ADA. *See also Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996) (recognizing that "[t]he remedies provided under the ADA are the same as those provided by Title VII"); *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995) (finding ADA claims subject to the same method of proof as Title VII cases).

In *Albermarle Paper Co. v, Moody*, 422 U.S. 405, 417-19 (1975), the United States Supreme Court declared that Title VII should be liberally interpreted to provide relief to all victims of discrimination. Likewise, the ADA's confidentiality provision should also be liberally interpreted.

The violation that took place in this case is analogous to those violations in Title VII cases where the employer retaliates against an employee who engaged in protected activity by providing a negative employment reference to prospective employers. In one such case, the Ninth Circuit affirmed the District Court of Hawaii where the employer argued that the employee could not establish any harm as a result of the negative reference. The Ninth Circuit rejected what it found to be the employer's cavalier "no harm, no foul" argument stating that Title VII does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion and that the employer was confusing the liability determination with the relief phase. *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997).

Further, the ADA, like Title VII, contains the same language prohibiting discrimination in the "terms, conditions or privileges of employment". *See* 42 U.S.C. § 12112(a) and 42 U.S.C. § 2000e, *et seq*. The United States Supreme Court has determined that the language regarding "terms and conditions of employment" must be broadly construed. *See Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (terms and conditions language not limited to economic or tangible discrimination and this language evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment); *National Railroad Passenger Corporation v. Morgan*, 122 S. Ct. 2061 (2002) (We have repeatedly made clear that although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to "economic" or "tangible" discrimination').

Likewise, the disclosure of an employee's medical record, in violation of the ADA, need not only be actionable when it results in something economic or tangible, especially since the disclosure is of a subject so private and sensitive as an individual's medical condition, a subject which any reasonable person guards against unnecessary disclosure and would find embarrassing and offensive if so disclosed by his or her employer.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. WARE CORNELL, JR.
Counsel of Record
ARIANNE BOMBALIER SUAREZ
CORNELL & ASSOCIATES, P.A.
Attorneys for Petitioner
1401 E. Broward Boulevard
Suite 204
Fort Lauderdale, FL 33301
(954) 524-2703

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 7, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16240

D.C. Docket No. 99-14267-CV-FJL

KEVIN DEMBINSKI,

Plaintiff-Appellant,

versus

NORTHROP GRUMMAN CORPORATION,

Defendant,

VOUGHT AIRCRAFT INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 7, 2002)

Before TJOFLAT, COX and MAGILL*, Circuit Judges.

* Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix A

PER CURIAM:

We find no merit in appellant's several claims for the reasons stated by the magistrate judge in his September 20, 2001 order granting appellee's motion for summary judgment.

AFFIRMED.

APPENDIX B — ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED SEPTEMBER 20, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-14267-CIV-LYNCH

KEVIN DEMBINSKI,

Plaintiff,

v.

VOUGHT AIRCRAFT INDUSTRIES, INC.,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [D.E. #36]

THIS CAUSE having come on to be heard upon the Defendant's Motion For Summary Judgment [D.E. #36] and this Court having reviewed the motion, the responses, the pertinent portions of the record cited by the parties and having held a hearing on September 13, 2001, at which time arguments of counsel were received, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Plaintiff has filed a Corrected Amended Complaint [D.E. #65] alleging three causes of action. His Complaint alleges discrimination on the basis of disability

under the ADA, violation of the Texas Workers' Compensation Act, and invasion of privacy.

2. The Defendant, Vought, is a supplier of commercial and military aerostructures, providing fuselage subassemblies, empennage structures, wings, nacelles, thrust reversers and other components for prime manufacturers of aircraft. The company is currently headquartered in Dallas, Texas.

3. The Dallas headquarters is responsible for all non-production functions including program management, finance, business management, and business development.

4. Vought has its production facilities in Dallas, Georgia, California, and Stuart, Florida.

5. Vought was formed in July 2000 as a result of Northrop Grumman Corporation's (NGC) divestiture of its commercial aerostructures operations. The Plaintiff, Dembinski, began employment with Grumman Aerospace (one of NGC's predecessor companies) in 1973 as an Aircraft Electrician and became director of business development in 1987.

6. Since 1995, his job has been focused almost exclusively on business development for the commercial nacelles product line. He worked out of the Stuart, Florida, facility until 1998 when NGC moved its corporate headquarters to Dallas.

7. Dembinski became Director of Program Development for the Nacelles Program within NGC's Commercial Aircraft Division. Pl. Dep. I at 109, Ex. 3. His duties included

initiation and development of existing and potential customers. Pl. Dep. I at 109-10, 122-23, Ex. 3; Broomall Decl. at A-2.

8. This position also required Dembinski to work closely and coordinate efforts with other members of the defendant's business development team and senior management; keep abreast of the latest technological and industry developments; participate in trade and aircraft shows and demonstrations; make business development visits to customers/potential customers at their places of business; and facilitate/conduct tour for customers/potential customers of defendant's production facilities. Pl. Dep. I at 109-17, 122-23, Ex. 3; Broomall Decl. at ¶ 6 and A-2; Broomall Dep. at 23-24. This required extensive travel throughout the world. Broomall Decl. at ¶ 6.

9. In April 1997, NGC made a business decision to convert its Stuart, Florida facility into primarily a production plant and move all business development personnel, including Dembinski, to its headquarters in Dallas. Broomall Decl. at ¶ 7.

10. Dembinski accepted NGC's offer of continued employment in Dallas as Director of Program Development for Nacelles Components and agreed to move to temporary housing in Dallas until after his children completed the 1997-98 school year when he planned to move his family to Dallas. During that time, Dembinski worked out of Dallas, but commuted to Stuart on weekends through August 15, 1998. Broomall Decl. at ¶ 8.

Appendix B

11. No business development employees worked out of the Stuart facility after 1998. Robinson Decl. at ¶ 3.

12. In early January 1999, Dembinski fell and injured himself while on a business trip in Paris, France. He was eventually diagnosed with post-polio syndrome ("PPS".) Pl. Dep. I at 163; Dr. Vandenakker Dep. at 24-25.

13. Dembinski filed a workers' compensation claim in Texas in January 1999 based on the injuries he sustained. NGC's workers' compensation carrier did not dispute the claim. It was not certain how long the injuries would require Dembinski to be out, but it was believed to be a temporary absence. Therefore, NGC provided Dembinski time off to recover and allowed him to work temporarily from his Stuart home in a limited capacity for a number of weeks.

14. NGC was unable to obtain from Dembinski any clarification as to when it could reasonably expect him to return to his full-time duties, so it placed him on medical leave effective March 29, 1999. Pl. Dep. I Ex. 5. He was told to contact NGC when he or his doctors were able to identify an approximate time for his release to work. Robinson Decl. at ¶ 4.

15. Dembinski told NGC that he could work full-time from his home in Stuart without traveling and without reporting for work in Dallas. Robinson Decl. at C-6. Dembinski also disagreed with NGC that if he were permanently unable to travel and to report to work in Dallas, then he would not be able to continue in his position as Director of Nacelles Business Development.

Appendix B

16. NGC has a policy to provide reasonable accommodations to qualified employees who can perform the essential functions of the job with or without a reasonable accommodation. Robinson Decl. at C-1. A Reasonable Accommodation Committee (consisting of employees from the medical, legal, equal-employment opportunity, workers' compensation, and employee relations departments, as well as the employee's own department manager), may be convened to examine an employee's accommodation request, and determine whether an accommodation is needed, reasonable, and appropriate.

17. On May 13, 1999. Dembinski requested the convening of a Reasonable Accommodation Committee to consider granting him work accommodations of indefinite duration, i.e.: (1) he be relieved of the travel duties of his job; and (2) he be allowed to work out of his home in Stuart, or out of the Stuart production facility, rather than at his workplace in Dallas.

18. NGC convened a Reasonable Accommodation Committee and after considering Dembinski's request, the Committee denied it. Pl. Dep. I Ex. 5. The Committee concluded that it was not reasonable to allow Dembinski to work from his home in Stuart and to avoid travel indefinitely when both travel and reporting to work in Dallas were necessary for him to do his job. Robinson Decl. at ¶ 5. Further, the Committee found that Dembinski's doctors could not provide an anticipated duration for his work restrictions. Therefore, the Committee considered those restrictions to be of indefinite duration. The Reasonable Accommodation Committee decision was documented in a May 26, 1999 letter

from Robinson to Dembinski advising of the Committee's conclusion. Pl. Dep. I Ex. 5.

19. Dembinski's treating physician, Dr. Carol Vandenakker, placed him on permanent restrictions prohibiting him from doing work of any kind and from traveling. Pl. Dep. II Ex. 10 at LBT 00043; 10-12, 16, 21-24; Dr. Vandenakker Dep. at 10-11. Dr. Vandenakker found Dembinski was not capable of maintaining any kind of reasonable employment. Dr. Vandenakker Dep. at 21-22, Ex. 3. The Doctor opined that Dembinski could not sit for more than 1-2 hours in a day nor for more than 15-30 minutes at a time without interruption. Vandenakker Dep. at 11-14, 17-19.

20. NGC felt that as its business development director, Dembinski needed to be physically present and participatory in the Dallas workplace during schedule-able times as an essential part of NGC's/Vought's business development goals. Broomall Dep. at 22-25; Broomall Decl. at ¶ 12. Failure to be co-located with the organizational workgroup was incompatible with the NGC/Vought team-oriented approach toward business development. *Id.* at ¶¶ 12-17. Since January 1998, all business development employees in Dembinski's organization have been physically located at the Dallas site.

21. NGC stated that the job description for Dembinski's position requires that he "[m]aintain liaison and establish a position of confidence, advocacy[,] and influence with customer personnel." *Id.* It also makes him "[r]esponsible for the timely identification and qualification of market opportunities and potential new product business." *Id.* These

necessarily require him to meet with customers and potential customers in person at their places of business, at trade and air shows, at industry conferences and seminars, and at on-site visits. Broomall Decl. ¶ 21.

22. The customers, business contacts, air and trade shows, industry conferences and seminars Dembinski was required to attend as part of his job took place in various locations in the United States and overseas.

23. Dembinski suggested that he could maintain his job by use of telephones, facsimile machines and using the video-conferencing facilities at NGC's Stuart production facility. He also submitted that his travel responsibilities could be handled by other personnel within his group in Dallas.

24. NGC disagreed and stated that face-to-face contact is critical to effective customer and business development. This includes not only contact with present and potential customers, but also face-to-face contact and interaction with co-employees in the business development group. Broomall Dep. at 23-24 and Broomall Decl. ¶¶ 19-23.

25. Dembinski admitted that he traveled extensively on business before his accident in Paris, regularly met with customers/potential customers face-to-face, and frequently attended air and industry shows. Pl. Dep. I. at 19, 109-17, 122-23 and 159. He confided to his physician that to do his job required a "significant amount of travel." Dr. Vandenakker Dep. at 9-10, 18, 20. Dembinski also admitted that his contacts with his business associates suffered when he was not able to travel. Pl. Dep. I at 109-17.

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26. In March and then again in October 1999, Dembinski applied for openings for separate Director of Customer Requirements positions in Melbourne, Florida on NGC's Joint STARS program. Pl. Dep. I at 22-24; Keck Decl. at ¶ 3. Steve Keck is the manager for Southeast Region Staffing for NGC, and is familiar with Dembinski's applications to fill these openings and why he was not selected for those positions.

27. Keck has stated that in regards to the March 1999 opening, Dembinski's resume and application revealed a lack of the necessary experience in marketing software and systems products required for that position. *See* Keck Decl. at ¶ 5. In regards to the October 1999 posting (for which there were two vacancies), Dembinski's resume and application revealed that he did not have sufficient background experience in joint services programs. *Id.* at ¶ 6.

28. The Horizons job postings plainly specify the need for and importance of familiarity and prior experience with the Joint STARS or like systems and their technology. Although Dembinski now attempts to amplify his experience in marketing military aerostructure hardware, none of the prior experience he listed on his resume related to software, integrated systems, or joint services programs. Based upon his resume and application, Dembinski lacked sufficient prior experience to qualify him for the particular needs of those job openings.

29. One of the persons selected for one of the positions was a former U. S. Air Force Colonel who had related airborne systems marketing experience. The other two people

hired for the October 1999 jobs were a former U. S. Army Colonel with Joint Chiefs of Staff and Defense Intelligence Agency experience and a former Air Force Lieutenant Colonel with extensive experience and knowledge of U. S. Air Force acquisition process and understanding of the Joint STARS System.

30. While Dembinski was out on leave, his manager, Vern Broomall, temporarily reassigned Dembinski's duties on a case-by-case basis to himself and two other employees, Terry Gray and Chris Wilt. These duties included maintaining and developing customer relations, attending trade and air shows, and the required business trips. Broomall Dep. at 26-27; Broomall Decl. at ¶ 24.

31. When it became clear that Dembinski's absence would be indefinite, Broomall reassigned Dembinski's responsibilities on a permanent basis. Broomall contacted Dembinski's customers to explain the change in personnel and provided them with new NGC contact information. Broomall Decl. ¶ 25. He informed these customers that Dembinski, their then-current NGC contact, was now "on medical leave" and that they should look to Gray as the new "focal point" for nacelles business development. Pl. Dep. I Ex. 1; Broomall Decl. at ¶ 25. Later, Wilt sent an e-mail to another potential customer seeking to set up business-generating opportunities with them and explained that the NGC had recently "lost" Tom Beatty to another company, and Dembinski to PPS. Pl. Dep. I Ex. 2.

32. By the late summer of 1999, NGC decided to eliminate its separate business development organization for

its commercial aerostructure business unit which included Dembinski's position. Everyone whose position was eliminated was sent a letter advising of the workforce reduction and that they would be laid off in sixty (60) days absent placement elsewhere within the corporation. Broomall Decl. ¶ 26 at A-4. The letter sent to Dembinski added that he would not be laid off and would remain on medical leave so long as his restrictions prevented him from performing the essential duties of his job. Dembinski ultimately was terminated in May 2001 after being on disability leave for the maximum two (2) years as permitted under Vought's internal corporate policies.

33. Dembinski filed an application for Social Security disability benefits based upon his physical condition. The Commissioner of the Social Security Administration entered a decision finding Dembinski to be disabled and entitled to benefits.

34. The application for benefits filed by Dembinski and the Commissioner's decision set forth that: (1) he became disabled and unable to work on March 26, 1999; (2) he lacked the residual functional capacity to perform even sedentary work on a sustained basis; (3) he was unable to perform his past relevant work; and (4) his ability to work was reduced by his inability to concentrate on and attend to work tasks on a sustained basis. *See* Notice of Decision dated June 11, 2001 and attached Decision. The Commissioner found Dembinski to be permanently disabled and entitled to benefits from March 26, 1999.

35. As referred to above, Dembinski's physician, Dr. Vandenakker, placed him on a permanent restriction prohibiting him from doing any work of any kind because his Post-Polio Syndrome. The Doctor concluded Dembinski could not maintain any kind of reasonable employment and was physically incapable of producing a full day's work. Dr. Vandenakker Dep. at 10-11; 21-24.

36. On July 14, 1999, Dembinski filed a charge of discrimination with the Florida Commission on Human Relations ("FCHR") alleging disability discrimination. Pl. Dep. I Ex. 6. Specifically, Dembinski alleged that he was forced onto medical leave despite the fact that he believed he was capable of continuing to work at his job and that NGC failed to accommodate his PPS. Pl. Dep. I Ex. 6.

37. The FCHR referred Dembinski's charge to the Equal Employment Opportunity Commission ("EEOC") for investigation. Pl. Dep. I Ex. 7-Attach. B. The EEOC terminated its investigation into the charge at Dembinski's request and issued a Notice of Right to Sue on August 9, 1999 and this case results therefrom. Pl. Dep. I Ex. 7-Attach. B.

38. After he filed this suit and based on the recommendation of his attorneys, Dembinski hired a reference-checking service to contact Vought surreptitiously to obtain a sample employment reference. Pl. Dep. II Ex. 4. When contacted, Broomall gave Dembinski the next-to-highest overall rating available and indicated that he would "enthusiastically recommend" him for employment. *Id.* at Ex. 4. Further, Broomall mentioned that Dembinski was on leave due to a long-term disability, and that Vought needed him to travel, but he could not. *Id.* Broomall never revealed the specific nature of Dembinski's condition. Broomall Decl. at ¶ 28.

Appendix B

CONCLUSIONS OF LAW

39. Federal Courts shall grant summary judgment when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). All reasonable doubts as to the facts are to be resolved in favor of the party opposing the motion for summary judgment. *United States v. Four Parcels of Real Property*, 941 F. 2d 1428 (11th Cir. 1991).

40. While the burden on a party seeking summary judgment is great, the opposing party has a duty to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A mere sliver of evidence in favor of the party opposing the motion, or evidence that is merely colorable or not significantly probative, is insufficient to defeat a properly supported motion for summary judgment. *See Anderson, supra*. Despite the presumption in favor of the non-moving party, it must be borne in mind that the purpose of Rule 56 is to eliminate the needless delay and expense to the parties and to the Court occasioned by an unnecessary trial. *See Celotex, supra*.

41. In respect to his ADA discrimination claim, Dembinski must prove all three elements of a prima facie case: (1) that he is an individual with a disability; (2) that he can perform the essential functions of a job he "holds or desires", with or without reasonable accommodation; and (3) that he was discriminated against because of his disability. *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000).

42. Dembinski meets the first element of the *prima facie* case because his Post-Polio Syndrome substantially limits one or more major life activities. However, this Court notes that the ADA does not protect all individuals with a disability, but only those "qualified" individuals with a disability. *See* 42 U.S.C. § 12112. A "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of the [job he] holds or desires." *See* 42 U.S.C. § 12111(8).

43. Dembinski does not claim that he can perform the essential functions of any job he held or desired without a reasonable accommodation. He asserts that he can still perform the essential duties of his position with the accommodation he suggested and which he deems to be reasonable.

44. Establishing the accommodations he proffers are reasonable and will enable him to perform the essential functions of a job he held or desires, involves a two-part inquiry: (1) what are Dembinski's essential job functions, and (2) are the accommodations Dembinski proffers reasonable and will they enable him to perform those functions.

45. Essential job functions are defined as the "fundamental job duties that an individual with a disability is actually required to perform." *See Earl, supra*. The ADA provides that, in determining what duties are essential functions, "consideration shall be given to the employer's judgment." 42 U.S.C. §12111(8). This inquiry into the essential functions is not intended to second guess the

employer's business judgment or to require an employer to lower its standards. 29 C.F.R. §1630.2(n), App. A. and *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997). The Eleventh Circuit in *Chapman v. Al Transport*, 229 F.3d 1012 (11th Cir. 2000) specifically stated that Federal courts do not sit as super-personnel departments that re-examine an entity's business decisions in respect to non-discriminatory reasons proffered for its actions.

46. The considerations underpinning Vought's insistence that the business development personnel be co-located in Dallas are the product of reasonable business judgment that the Court should not second-guess. The carrying out of Vought's business development strategies is precisely a core function for which Dembinski was hired and for which his position exists. The Court notes Dembinski moved to Dallas pursuant to the relocation by his employer. He worked and traveled from the Dallas office until he was injured while on a business trip in Paris. An essential function of that job requires some routine presence in the Dallas headquarters which Dembinski could not provide. Similarly, travel is necessary to performing the essential functions of Dembinski's job. Dembinski's position at Vought was maintaining and developing a global customer base for its nacelles products.

47. Dembinski's job description required him to maintain a relationship with his customers that requires face-to-face communication and travel. Dembinski's inability to travel would cause other employees to increase their own travel schedules to perform those duties which this Court finds to not be reasonable. Dembinski has the burden of both

identifying an accommodation that would allow him to perform the job, and proving that any proposed accommodation is reasonable. *See Willis v. Conopco, Inc.*, 108 F.3d 282, 286 (11th Cir. 1997). He has not met this burden.

48. An accommodation is reasonable only if it enables the employee to perform the essential functions of his job. The elimination or changing of the essential functions of a job is not a reasonable accommodation under the ADA. *Lucas v. Grainger*, 257 F.3d 1249 (11th Cir. 2001) and *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347 (S.D. Fla. 1999). The ADA does not require an employer to accommodate an individual by creating a new job for that individual. *Rio v. Runyon*, 972 F. Supp. 1446 (S.D. Fla. 1997). Reassigning essential job functions to other employees to enable an employee with a disability to do the job is unreasonable as well under the ADA. *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522 (11th Cir. 1997).

49. Dembinski sets forth two accommodations that he claims would enable him to do his job: (1) that he be allowed to work at the Stuart production facility and/or out of his Stuart home and (2) that he be excused from all the requisite significant travel obligations of that job. While the Eleventh Circuit has not specifically addressed the issue of under what circumstances, if ever, working from home or a remote site is a reasonable accommodation, District Courts in this Circuit and other Courts of Appeal have consistently held that, when the job requires the employee to interact with other employees to complete the tasks and duties assigned to them, working from home is not a reasonable accommodation. *Paleologos*

v. Rehab Consultants, Inc., 990 F. Supp. 1460 (N.D. Ga. 1998): *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555 (N.D. Ga. 1995), *aff'd* 86 F.3d 1171 (11th Cir. 1996); *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) (Posner, J.) (finding that most jobs involve teamwork, and a job involving teamwork cannot be performed at home without suffering a substantial loss in quality, performance, and productivity, and thus "[n]o jury [could be] permitted to stretch the concept of 'reasonable accommodation' so far.").

50. Dembinski's job, which requires in-person contact with fellow employees and customers/potential customers, cannot be performed at home, and thus his request to work from Stuart is not a reasonable accommodation.

51. Accepting Dembinski's proffered accommodation to be relieved from all travel responsibilities would have necessarily required NGC to either or both: (1) create a new job for him; and/or (2) reassign Dembinski's travel-related responsibilities to an existing employee or hire a new employee to perform them. As cited above herein, that has been found by the courts to not be a reasonable accommodation.

52. Dembinski has identified two NGC postings to which he responded. First in March and then in October 1999, Dembinski applied for Director of Customer Requirements positions on the Joint STARS program in Melbourne, Florida. This Court finds that the record does not establish a genuine issue as to whether or not he was qualified for those positions. In each instance, he was lacking some of the specialized

experience the job required. As a result, NGC did not have an obligation under the ADA to consider him further for either position. *See Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997).

53. The mere fact that Dembinski filed and was granted disability benefits by the Social Security Administration does not automatically preclude his also seeking the present claims he makes under the ADA. However, the claims made and evidence submitted by Dembinski in regards to such application for disability benefits are highly relevant to the apparently inconsistent position he is now taking in this litigation. *See Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999); *Lane v. BFI Waste Systems of North America*, 257 F.3d 766 (8th Cir. 2001); *Jammer v. School District of Palm Beach*, 1999 WL 1073688 (S.D. Fla. 1999).

54. Dembinski does not explain how he and his physician successfully established for the Social Security Administration that he was permanently unable to perform any substantial gainful activity due to his impairment and then, in this litigation, claim that with the accommodations he proffers that he would be able to perform the essential elements of his job as he performed it immediately preceding his injury. His physician set forth his limited residual functional capacity which would even preclude sedentary work, which is the lowest exertional category of work under the applicable Social Security Regulations. Dembinski fails to point to any evidence which would establish that his proffered accommodations address the physical limitations as testified to by his physician, Dr. Vanenakker.

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55. As a result of all of the foregoing, this Court concludes that Dembinski is not a qualified individual with a disability because there is no reasonable accommodation that would facilitate his performance of all the essential functions of the jobs he had or sought in light of his medical condition. There has been no reasonable accommodation identified that would facilitate the performance of the essential job functions of his position. Therefore, Vought is entitled to summary judgment on Dembinski's ADA discrimination claims. *See Jackson v. Veterans Administration*, 22 F.3d 277 (11th Cir. 1994).

56. Dembinski also claims that Vought improperly disclosed information to the public about his medical condition. The ADA requires that information gained through medical examinations and inquiries be treated as a confidential medical record. 42 U.S.C. § 12112(d)(3), (d)(4). Dembinski cannot recover for such violation unless he can prove he suffered some legally-compensable, tangible injury-in-fact. Liability for damages under section 12112(d) must be based on something more than a mere violation of that provision. There must be some cognizable injury in fact of which the violation is a legal and proximate cause. *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554 (5th Cir. 1998).

57. Dembinski points to Broomall's letters to customers and Broomall's truthful response to Dembinski's surreptitious reference check. He also cites the Wilt's e-mail. Pl. Dep. I at 76, 80-83. From this, he speculates his reputation has been harmed. *Id.* However, as pointed out by counsel for Vought in the motion and in oral argument before this Court, Dembinski has not put forth any evidence of damage to his

reputation. The letters and e-mail spoke only the truth: Dembinski was on medical leave; that he had PPS; and he was no longer the contact person at NGC for nacelles business development. Pl. Dep. I Exs. 1, 2.

58. The employment reference check commissioned at his attorney's suggestion did not even go that far — other than mentioning merely that Dembinski was out on leave from his job with a long-term disability because he could not travel extensively — Broomall reportedly "enthusiastically recommend[ed]" Dembinski for employment and gave him an overwhelmingly positive job reference. Broomall made no mention of PPS or any other impairment during that reference. Thus, there is no evidence to support Dembinski's belief that NGC intended to harm his reputation, or that his reputation with his contacts had been, in fact, harmed.

59. The only "injury" that Dembinski claims he has suffered in connection with the disclosure is that he finds it "embarrassing" when he explains to others that he has PPS and that he had polio as a child. Pl. Dep. i at 63-65. Dembinski did not testify that the mere knowledge by others that he suffers from PPS is embarrassing to him. However, even if this is accepted, he must do more than merely allege generic embarrassment. There must be some evidence to establish he has suffered some actual, non-speculative injury in order to overcome the pending motion for summary judgment. *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000). Dembinski has not met his burden in this regard.

60. Dembinski has no evidence of any legally-compensable injury. Pl. Dep. II at 14-33. He simply speculates

that he has suffered some injury based solely on the fact of disclosure itself. Indeed, when asked what injury he has suffered, Dembinski discusses the possibility of injury rather than any actual injury. Since he has not put forth any evidence that proves he has suffered any actual injury-in-fact arising from any disclosure of anything. Dembinski cannot recover under Section 12112(d). *See Armstrong, supra.*

61. Dembinski filed his workers' compensation claim under Texas law since he was employed at the Dallas office and resided there at the time he was injured during his business trip to Paris, France. The Texas Workers' Compensation Act ("TWCA") prohibits discrimination/ retaliation against an employee because the employee filed a workers' compensation claim. Texas courts apply a burden-shifting approach to these retaliation claims as does federal law. Initially, the burden is squarely on the employee to prove a prima face case of retaliation. *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 589-90 (5th Cir. 1995).

62. The employee must establish a causal connection between the filing of the workers' compensation claim and the adverse job action. If the employee can establish the required causal relationship, then the burden shifts to the employer to articulate a legitimate reason for the job action taken. Once the employer articulates its legitimate reason, the burden shifts back to the employee to rebut the employer's proffered reason. If the employee fails to rebut the proffered reasons with substantial evidence, his claim must be dismissed under the same analysis as in retaliation claims under applicable federal statutes. *See Lucas, supra.*

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63. Texas courts have established the following factors as pertinent to whether there is sufficient evidence to establish the necessary causal link: (1) knowledge of the employee's claim by the pertinent decision-maker; (2) an employer's expressed negative attitude toward the employee's injury; (3) failure to adhere to established company policy; (4) discriminatory treatment when compared to similarly-situated employees; and (5) evidence that the employer's proffered reason is false. *Munoz v. H & M Wholesale, Inc.*, 926 F. Supp. 596, 610 (S.D. Tex. 1996). The issue that is the key to such an analysis is whether the employee was treated differently than other, similarly situated employees because he filed a workers' compensation claim.

64. Dembinski can establish that he engaged in statutorily protected expression by the filing of his worker's compensation claim and that he suffered adverse employment action by being terminated once he exhausted his permitted medical leave under company policies. However, there is no evidence in the record of any causal link between the two. The record establishes that the decision to eliminate the positions in the business development department of Vought involved all employees in that department and not just Dembinski. Further, this was a business decision of Vought and as stated previously, the courts should not sit as super-personnel boards to second guess such decisions made in the ordinary course of business. *See Pennington v. City of Huntsville*, 2001 WL 936056 (11th Cir. 2001).

65. Dembinski cannot make out a *prima facie* case because he can point to no similarly situated employee who was treated more favorably than he was. Specifically, he

cannot identify any business development employee who was allowed to work from home indefinitely, nor show any employee whose job required travel who was excused indefinitely from those job's travel obligations. Finally, he can point to no employee who was hired for a position for which they did not have the requisite qualifications for the job. Since no employee similarly situated to Dembinski was treated better than he was, he cannot establish the requisite *prima facie* case of retaliation.

66. All employment actions taken by NGC with regard to Dembinski were taken for legitimate, nondiscriminatory reasons. First, Dembinski was placed on medical leave because his indefinite work restrictions prevented him from being able to perform activities that were essential to his job, those being his reporting to work in Dallas and travel. Indeed, Dembinski's own physician has him on medical restrictions that prevent him from working altogether (Pl. Dep. II Ex. 10 p. 2) and he himself has certified that "[t]he severe pain . . . and fatigue make it impossible to work." *Id.* Ex. 7. Second, neither Dembinski nor NGC were able to discover any reasonable accommodation that would have allowed him to perform his essential job functions.

67. Dembinski has also filed claims for common law invasion of privacy. Florida common law recognizes four such causes of action for invasion of privacy: (1) intrusion on the physical seclusion or solitude; (2) public disclosure of private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in public eye; and (4) appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage. Dembinski has sought to invoke the first two claims: intrusion upon seclusion and public disclosure of private facts.

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68. The tort of intrusion upon seclusion requires a trespass or intrusion upon physical solitude. *Heath v. Playboy Enterprises, Inc.*, 732 F. Supp. 1145 (S.D. Fla. 1990). Dembinski has not made any allegation that NGC pried, trespassed, or otherwise physically intruded upon any of his private areas. In fact, he admits that he himself told NGC about his PPS. Pl. Dep. I at 169-70). Thus, his claim for intrusion upon seclusion must fail.

69. To succeed on a claim of public disclosure of private facts, Dembinski must prove four elements: (1) a disclosure to the public; (2) that private facts were disclosed; (3) the matter publicized was highly offensive to a reasonable person; and (4) the matter is not a legitimate concern to the public. In order to constitute a public disclosure, the information must have been provided to the public-at-large or to so many people that the matter is "substantially certain" to become "public knowledge." *Lewis v. Snap-On Tools Corp.*, 708 F. Supp. 1260 (M.D. Fla. 1989).

70. Dembinski's public disclosure claim fails because there was no disclosure to the public at large. In *Williams v. City of Minneola*, 575 So.2d 683 (5 DCA Fla.1991), plaintiff offered evidence that a police officer played an evidentiary autopsy video in his home to three other men not involved in the investigation, and that the police chief showed photographs of the same autopsy to a janitor for personal reasons. The court held, on summary judgment, that, given the "few" people involved, "there was no substantial certainty that because of the [defendants'] actions, the pictures of the autopsy would be publicly disseminated."

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71. Likewise, in *Lewis*, the plaintiff alleged that the defendant disclosed derogatory remarks to: "various and sundry people"; "a large number of people, some of whom were non-customers" of plaintiffs; and, "third persons, including plaintiff's customers." The court held that "the mere conclusory allegation that the alleged disclosure was to 'large numbers of persons' does not meet the requirement that the publication be to the general public . . . and certain to become public knowledge."

72. There was no public disclosure in this matter before this Court. The only evidence of any disclosure by Vought is: (1) Broomall sent a letter to several of NGC's customers advising them who their new point-of-conduct would be because Dembinski was on medical leave: (2) Chris Wilt sent an e-mail to a single customer representative pursuing an opportunity to visit to discuss future business opportunities and, in the process, explained that Dembinski was lost to NGC due to Post-Polio Syndrome (who forwarded it to his boss to ascertain his boss' desires relative to how to proceed with the visit request and who, in turn, forwarded it without comment to Dembinski); and (3) Broomall purportedly revealed to a single individual from a reference-checking service paid by Dembinski that Dembinski was on long-term disability leave because he could not travel.

73. Dembinski does not purport to have any evidence to suggest that publication went beyond these few individuals. Several customers and a single agent hired by Dembinski does not a public-at-large make. Further, Dembinski only offers speculation that his medical condition was disclosed beyond those individuals identified above. There are no facts

or evidence to support his speculation. Therefore, even assuming the matters disclosed would be "highly offensive to the reasonable person", Dembinski cannot prove that his medical condition was so broadly published as to become public knowledge.

74. This applies equally to Dembinski's speculation that this same information was supplied to prospective employers with whom he had applied for jobs. To accept his conclusions, the finder of fact would have to assume this information was passed to such prospective employers and that those companies decided to not hire him solely on the basis of his disability. Not only does Dembinski not offer any evidence of this medical information being communicated to any specific potential employer with whom he had sought employment, he offers no evidence that he was not hired because of his medical condition. This Court finds that this is building inference upon inference to make a speculative conclusion. Therefore, his public disclosure claim must fail as well.

75. This Court finds that the Plaintiff has failed to proffer sufficient evidence to create a genuine issue of fact as to the claims he makes in this litigation as more specifically discussed by this Court herein. Accordingly, Vought is entitled to summary judgment on all claims asserted by Dembinski herein.

It is therefore,

ORDERED AND ADJUDGED that the Defendant's Motion For Summary Judgment is hereby **GRANTED**.

Appendix B

DONE AND ORDERED at Fort Pierce in the Northern Division of the Southern District of Florida this 20 day of September, 2001.

s/ Frank J. Lynch, Jr.
Frank J. Lynch, Jr.
UNITED STATES MAGISTRATE JUDGE

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-14267-CIV-LYNCH

KEVIN DEMBINSKI,

Plaintiff,

v.

VOUGHT AIRCRAFT INDUSTRIES, INC.,

Defendant.

FINAL JUDGMENT

THIS CAUSE having come on to be heard upon Defendant's Motion for Summary Judgment, and this Court having granted the Motion, and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that Judgment is entered in favor of Defendant pursuant to Fed.R.Civ.P. 58, that Plaintiff shall take nothing, and this action be dismissed on the merits, it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall **CLOSE** this case and **DENY** all pending motions as moot.

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 20 day of September, 2001.

s/ Frank J. Lynch, Jr.
Frank J. Lynch, Jr.
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
SEP 13 2002
CLERK

No. 02-198

IN THE

Supreme Court of the United States

KEVIN DEMBINSKI,
Petitioner,

v.

VOUGHT AIRCRAFT INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

W. RUSSELL HAMILTON, III *
CHRISTOPHER P. HAMMON
MORGAN, LEWIS & BOCKIUS LLP
5300 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2339
305.579.0300

* Counsel of Record

Counsel for Respondent Vought Aircraft Industries, Inc.

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QUESTION PRESENTED

Whether a plaintiff can prevail on a claim under the Americans with Disabilities Act for an allegedly improper disclosure of truthful information falling within the protections of 42 U.S.C. § 12112(d) without any evidence of harm proximately caused by such disclosure.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of this Court, Respondent, Vought Aircraft Industries, Inc. ("Vought"), states that it does not have a parent company and that no publicly held company owns 10% or more of its stock.

In an abundance of caution, Vought also notes that Northrop Grumman Corporation was formerly a party to this action. (Vought acquired Northrop Grumman Corporation's commercial aerostructures business, in which petitioner was formerly employed, in July 2000. By agreement of the parties, the district court substituted Vought as defendant in this action.) Northrop Grumman Corporation does not have a parent company and no publicly held company owns 10% or more of its stock.

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IN THE

Supreme Court of the United States

No. 02-198

KEVIN DEMBINSKI,
Petitioner,

v.

VOUGHT AIRCRAFT INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The vast majority of petitioner's Statement of the Case has no direct bearing on the Question Presented. And much of it, both portions irrelevant and pertinent to the Question Presented, recites "facts" that either were not part of the record before the lower courts, or are inaccurate or distort the factual findings of those courts. Rather than address each of those distortions, inaccuracies and unsupported "facts," described below is an overview of the case based on the record before, and factual findings of the lower courts (findings which are not challenged by petitioner), with emphasis on those portions of the record pertinent to the Question Presented.

A. Factual Background And The Litigation Below.

Petitioner's complaint, originally brought against Northrop Grumman Corporation ("NGC") [1], asserted claims of: disability discrimination under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA"); inappropriate disclosure of confidential medical information under the ADA, 42 U.S.C. § 12112(d)(3)(B) [2]; retaliation under the Texas Workers' Compensation Act, Texas Labor Code § 451.001 ("TWCA"); and invasion of privacy under Florida common law.

Petitioner, Kevin Dembinski ("Dembinski"), the global Director of Business Development for NGC at the time, was injured as a result of an unfortunate fall on an icy sidewalk while returning one evening from entertaining a customer in Paris. Pet. App. at 6a. The injury, or the original medical treatment of the injury, aggravated a preexisting muscoskeletal condition. Dembinski was ultimately diagnosed as having Post Polio Syndrome ("PPS"), and his treating physician eventually placed him on permanent restrictions prohibiting him from doing work of any kind. *Id.* at 6a-8a & 13a. Understandably, Dembinski himself certified that "[t]he severe pain . . . and fatigue make it impossible to work."

In the interim, though Dembinski was severely restricted in what he could do and no longer could perform all of the essential job functions required of him as NGC's global Director of Business Development, NGC initially allowed Dembinski to perform some work temporarily from home

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[1] Respondent, Vought Aircraft Industries, Inc. ("Vought"), acquired NGC's international commercial aerostructures business, in which petitioner was formerly employed, in July 2000. By agreement of the parties, the district court substituted Vought as defendant in this action.

[2] *See* Appendix A for portions of 42 U.S.C. § 12112(d) pertinent to the Question Presented.

(something NGC was not required to do under the ADA, but did nonetheless). *Id.* at 6a. But, it eventually became clear that Dembinski's condition, preventing him from being able to return and perform the full range of essential job functions, was not improving and would be of an indeterminate duration. *Id.* As a result, NGC placed Dembinski on a leave of absence until he could so perform. *Id.*

In response to a request from Dembinski, and pursuant to NGC policy, a Reasonable Accommodation Committee ("RAC") was convened to determine whether Dembinski was capable, in his then-current condition, of performing the essential functions of his job; and, if not, whether there was any reasonable accommodation that would facilitate his return to performing the essential functions of his job. *Id.* at 7a. After considering the issues, the RAC concluded that it was not possible for Dembinski to perform all of the essential functions of his position as global Director of Business Development without any travel and without some routine, schedulable presence in the workplace where cognizant management and the rest of the Business Development team were co-located. *Id.* at 7a & 8a. And, per Dembinski and his physician, he could do neither. *Id.* at 8a. But he proffered relief from travel and workplace presence as reasonable accommodations. *Id.* at 7a. The RAC concluded that, based on this, Dembinski could not perform the essential functions of his job and further concluded there was no reasonable accommodation that would otherwise afford him the ability to perform those essential job functions. *Id.*

The district court found those conclusions (and a subsequent conclusion that Dembinski was not qualified for openings at another facility (*id.* at 18a-19a)) to be justified as a matter of law based on material facts as to which there was no genuine dispute (Pet. App. 15a-20a). It, thus, entered judgment for Vought on Dembinski's ADA disability claims

(*id.* at 29a). The court of appeals affirmed (*id.* at 1a-2a) and those findings are not being challenged by petitioner.

As to Dembinski's TWCA claim and his array of Florida common law invasion of privacy claims, the district court likewise found as a matter of law based on facts as to which there is no genuine dispute that each failed (*id.* at 22a-24a & 24a-27a) and, thus, also entered judgment for Vought on them. Though Dembinski did not seek review in the court of appeals of the invasion-of-privacy claims, he did as to the TWCA claim. As to that TWCA claim, the court of appeals affirmed the district court, and that is not being challenged here.

On Dembinski's ADA claim of inappropriate disclosure of confidential medical information, the district court found that because Dembinski had no evidence of any legally-compensable injury-in-fact, a prerequisite element for such a claim, Dembinski's claim under 42 U.S.C. § 12112(d) failed. *Id.* at 20a-22a. Based on this, the district court entered judgment for Vought on that claim as well. And, the court of appeals affirmed. The Question Presented in the Petition does not challenge the underlying factual findings; rather it relates only to the legal standard applied in addressing this inappropriate-disclosure claim.

B. Facts Pertinent To The Question Presented.

The communications underlying petitioner's inappropriate-disclosure claim were three.

When it was determined that Dembinski's previously-perceived temporary absence would be indefinite, steps had to be taken to reassign Dembinski's responsibilities, and to communicate this to affected customers. *Id.* at 11a. To accomplish this, a letter was sent to several customers. *Id.* The letter explained that Dembinski, their then-current NGC contact, was now "on medical leave" and they should look to another named individual as their NGC contact. *Id.* This is

the first communication Dembinski asserts was an inappropriate disclosure of confidential medical information violative of 42 U.S.C. § 12112(d).

Approximately seven months later, one of Dembinski's co-workers sent an e-mail to one potential customer seeking to set up business-generating opportunities. *Id.* In it (and in order to explain why he, and not one of them, was the one making the contact), the co-worker indicated, among other things, that NGC had recently "lost" another employee to a different company and Dembinski to PPS. *Id.* This is the second communication to which Dembinski points as being an inappropriate disclosure by his employer of confidential medical information.

The final communication comes from a report commissioned by Dembinski from a reference-checking service retained by Dembinski at his attorney's suggestion following the filing of his suit.[3] *Id.* at 13a. According to the report, Dembinski's manager, in addition to giving Dembinski the next-to-highest rating available and offering that he would "enthusiastically recommend" Dembinski for employment, truthfully indicated (in response to inquiries from the reference-checking service) that Dembinski was on leave due to a long-term disability and that Vought needed Dembinski to travel, but he could not. *Id.* The nature of Dembinski's condition was not revealed. *Id.*

By Dembinski's own admission, he had no actual evidence of any injury proximately caused by any of the above communications. *Id.* at 20a-22a. Indeed, when asked what injury he had suffered, Dembinski merely asserted the possibility of injury. *Id.* at 22a. In the end, he finally

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[3] In both the district court and before the court of appeals, Dembinski relied very heavily on this particular communication in support of his claim. *See, e.g., id.* at 21a. But it is not clear from his Petition whether or not Dembinski continues to rely on it before this Court.

admitted that: "I don't know what the harm was, okay. I do not know. It could have been catastrophic, it could have been nothing." Rather, Dembinski attempted to support his claim below by asserting that he suffered some injury based solely on the fact of disclosure itself. *Id.* at 21a-22a. In response to which the district court specifically found that Dembinski has "not put forth any evidence that proves he has suffered any actual injury-in-fact arising from the disclosure of anything." *Id.* This was affirmed by the court of appeals and Dembinski does not challenge this finding.

Despite this, at pages 14 through 15 of his Petition, Dembinski recites as "established" below that: the disclosures damaged his reputation; the correspondence to customers resulted in numerous questions to Dembinski about his medical condition; he suffered severe pain and suffering due to the disclosures; and the disclosures benefited Vought because had he obtained employment with a competitor/customer that would have enhanced that firm's competitive position against Vought. Dembinski cites no record support for any of these and noticeably missing from the district court's findings of fact (which have been affirmed by the court of appeals and are not challenged by the Petition) are any such findings. This is hardly surprising, because there was no evidence before the district court of any of these. Indeed, the district court specifically found (and these findings are not challenged here) that: "Dembinski has not put forth any evidence of damage to his reputation" (Pet. App. at 20a-21a); "Dembinski has no evidence of any legally-compensable injury" (*id.* at 21a); and "there is no evidence to support [Dembinski's] belief that NGC intended to harm his reputation, or that his reputation with his contacts had been, in fact, harmed" (*id.*).

ARGUMENT

The lower courts' decisions were correct and further review is not warranted. There is no conflict among the circuits on the question presented—to the contrary, the two other circuits that have addressed the narrow issue presented have decided it consistent with the decisions of the court of appeals and the district court in this case. Moreover, the question presented was not argued below, and has, thus far, been rarely addressed in the lower courts and is not one of such importance as to justify the sort of premature review advocated by Dembinski. And finally, even if this Court were inclined to take up the Question Presented, this case presents a poor vehicle upon which to decide this question of statutory construction because to do so would require this Court to make preliminary findings not made by either of the lower courts or to indulge assumptions that are problematic based on the record.

I. DEMBINSKI HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

A. The Relative Importance Of The Legal Question Presented Is Slight.

The Question Presented is not one of such wide-spread national significance as to justify review in the absence of circuit conflict. Vought's exhaustive research has revealed that, of the many thousands and thousands of officially and unofficially reported ADA cases since the statute's inception in 1990, less than 150 even *cite* the subsection of the ADA, 42 U.S.C. § 12112(d), at issue here. And the vast majority of those cases deal with the propriety of employee fitness-for-duty examinations—a topic wholly irrelevant to the Question Presented. Only a small minority of the remainder even contain claims based on inappropriate disclosure of confidential medical information. And, most significantly,

only two other courts of appeals have been reported to have decided the issue, and both have ruled against petitioner's position. *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 970 (8th Cir. 1999); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998).[4] Moreover, the factual circumstances of this case—a plaintiff suing under an infrequently-used cause of action and seeking legal redress for a nonexistent injury—is not one likely to often recur. In sum, when compared to the myriad of issues of wide-spread application that are being litigated regarding the breadth and depth of the ADA, and indeed have been recently addressed by this Court (*see, e.g., Chevron USA, Inc. v. Echazabal*, 122 S. Ct. 2045 (2002); *US Airways v. Barnett*, 122 S. Ct. 1516 (2002); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)), the importance of the legal Question Presented by this case is slight.

B. The Lower Courts Did Not Deviate From Existing Jurisprudence And The Question Presented Has Had Only Limited, But Uniform, Circuit Treatment.

In reaching its decision that Dembinski's claim under 42 U.S.C. § 12112(d) failed because Dembinski had not presented any evidence of a legally compensable injury-in-fact, the district court applied the only existing and, *heretofore, non-controversial* jurisprudence addressing that

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[4] It would also appear that there has been but a single reported case (*Doe v. Syracuse Sch. Dist.*, 508 F. Supp. 333 (N.D. N.Y. 1981)) construing the regulation under the Rehabilitation Act of 1973, 29 U.S.C. § 701, upon which 42 U.S.C. § 12112(d) is based. *See Armstrong*, 141 F.3d at 562 n.19.

issue to factual findings not in dispute before this Court. The court of appeals affirmed, *per curiam*, simply finding "no merit in appellant's several claims for the reasons stated" by the district court. Pet. App. 2a.

Dembinski acknowledges that there is no conflict among the circuits on the question presented. Pet. at 13. The two other courts of appeals that have decided the issue are in unison: a plaintiff bringing a claim for inappropriate disclosure of confidential medical information under the ADA, 42 U.S.C. § 12112(d), must prove that he has suffered some legally-compensable, tangible injury-in-fact. *Cossette*, 188 F.3d at 970; *Armstrong*, 141 F.3d at 562 ("[D]amages liability under [42 U.S.C. § 12112(d)] must be based on something more than a mere violation of that provision. There must be some cognizable injury in fact of which the violation is a legal and proximate cause . . . ."). And the only other circuits considering analogous issues under 42 U.S.C. § 12112(d) are in complete accord. *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 & n.5 (10th Cir. 1998) (holding that plaintiff bringing claim under 42 U.S.C. § 12112(d) based on his being subjected to an ADA-prohibited employment inquiry must likewise prove that he suffered a tangible injury-in-fact to prevail); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 520 (3d Cir. 2001) (holding that no claim can lie for violation of 42 U.S.C. § 12112(d)'s record-keeping obligations without proof of some consequent injury).

This Court's limited resources should not be expended on an issue that has arisen in only this and two other federal appellate cases, and has been resolved the same way in all three as well as being consistent with the only two other federal appellate cases addressing analogous issues under the pertinent statutory provision. Rather, this issue should be allowed to continue to percolate in the lower courts until either a broad consensus is reached, thus obviating any need for review, or a substantial conflict develops among the

circuits making review appropriate. Until then, the issue presented does not warrant further review.

II. TO REACH THE QUESTION PRESENTED WOULD REQUIRE EITHER: RESOLUTION OF A NUMBER OF PRELIMINARY QUESTIONS NOT DECIDED BY THE LOWER COURTS; OR THE MAKING OF UNSUPPORTED ASSUMPTIONS AS TO THE PROPER ANSWER TO THOSE QUESTIONS.

Because the district court found the absence of any evidence of any legally cognizable injury-in-fact, neither it nor the court of appeals addressed other prerequisite elements of a 42 U.S.C. § 12112(d) claim for relief. But, for this Court to reach the Question Presented, it would require this Court to make preliminary findings, not specifically made by either of the lower courts, or to make assumptions that: the ADA, specifically 42 U.S.C. § 12112(d), provides a private right of action for someone who is not a qualified individual with a disability, but about whom confidential medical information is disclosed; the type of information disclosed in this case was the type of medical information Congress intended to protect from disclosure; the underlying information was derived from one of the limited covered forms of medical examinations or inquiries; and, particularly in the case of the co-worker's e-mail disclosure that Dembinski had PPS, the disclosure was made by someone intended by Congress to be able to expose an employer to liability under 42 U.S.C. § 12112(d) by such disclosure.

The ADA only protects from disclosure "information . . . regarding the medical condition or history" of the employee. The ADA does not, however, define, "information . . . regarding the medical condition or history," and there is a dearth of reported cases under either the ADA or the Rehabilitation Act providing any guidance. While disclosure of someone's diagnosis would seem to fall within a

reasonable construction of "medical condition," information that someone is "on medical leave," "cannot travel," or is "on leave due to long-term disability," are far more problematic. Thus, to reach the Question Presented would either require this Court to construe the meaning of "information . . . regarding the medical condition or history" and make a finding as to whether the disclosures presented here fall within that construction, or make an assumption that the disclosures presented here are "information . . . regarding the medical condition or history" of Dembinski.

Second, the ADA only protects from disclosure the medical condition or history information obtained as part of a so-called "employment entrance examination" (42 U.S.C. § 12112(d)(3)), or from voluntary examinations as part of a voluntary health program or, possibly, from inquiries into the ability of an employee to perform job-related functions (*compare* 42 U.S.C. § 12112(d)(4)(B) & (C) *with* 42 U.S.C. § 12112(d)(3)(B)). It does not protect from disclosure information that might have come from any other source—for example: through the employee's own voluntary disclosure to management, co-workers or friends; or those co-workers' or friends' re-disclosure; or from an employee benefit plan or workers' compensation carrier providing the employee healthcare, disability or workers' compensation benefits. No evidence was presented by Dembinski (and no finding made by the district court) as to the origin of the information disclosed by Dembinski's manager. Thus to reach the Question Presented based on the manager's disclosure would require this Court to assume (without any record support or underlying lower court findings) that Dembinski's manager acquired the disclosed information from one of the forms of examination or inquiry specified in 42 U.S.C. §§ 12112(d)(3) or 12112(d)(4)(B), and not some other source. Further, Dembinski did not present any evidence that the original source of the information from which Dembinski's co-worker learned that Dembinski had PPS was one of the covered

forms of examination or inquiry. As a result, to reach the Question Presented as to the co-worker's disclosure would require an additional assumption by this Court (once again, without any record support or underlying lower court finding) that the information that came to the co-worker was derived from the type of examinations or inquiries covered by 42 U.S.C. §§ 12112(d)(3) or 12112(d)(4)(B).

Finally, the prohibitions of 42 U.S.C. § 12112(d) apply only to "covered entit[ies]." "Covered entity" is defined by the ADA to include "employer[s], employment agenc[ies], labor organization[s], or joint labor-management committee[s]." 42 U.S.C. § 12111(2). While established ADA jurisprudence makes an employer responsible for the unlawful conduct of its managers and supervisors, this derivative liability generally does not extend to co-workers. The only record evidence as to the disclosing co-worker's status is that he held a position similar to Dembinski's. And the only finding by the district court as to that status is that he was assigned some of Dembinski's duties. Pet. App. 11a. Thus, to reach the Question Presented as to the co-worker's disclosure would also either require a finding by this Court, based on this limited factual record, that the co-worker's status was such as to make his employer liable under 42 U.S.C. § 12112(d) for his disclosure or require an assumption by this Court (based on this same limited factual record and no underlying lower court finding) to the same effect.

As the above establishes, to reach the Question Presented would compel this Court to either make a number of threshold determinations and factual findings or assumptions unsupported by the record below or the lower courts' findings. Thus, any ruling on the Question Presented would be a ruling in the abstract and potentially ultimately irrelevant to the disposition of the case between the parties.

III. DEMBINSKI DID NOT ARGUE THE QUESTION PRESENTED BEFORE THE LOWER COURTS AND, THUS, SHOULD NOT BE HEARD TO RAISE IT FOR THE FIRST TIME HERE.

As stated by the Petitioner, the Question Presented, once again, is whether an "employee [is] required to establish a 'tangible injury in fact' in order to defeat a motion for summary judgment . . . and sustain a claim" under 42 U.S.C. § 12112(d). Thus, Dembinski's own Question Presented challenges only the injury-in-fact standard followed by the district court (*compare, e.g., Armstrong*, 141 F.3d at 562 *with* Pet. App. at 20a) and affirmed on appeal, arguing that a claimant should prevail upon proof of a mere violation of 42 U.S.C. § 12112(d) and in the absence of any proof of any proximately-caused harm. Pet. at 12.

But Dembinski did not make that argument either to the district court or to the court of appeals. Rather, Dembinski only argued before the district court and in his briefs on appeal that he had, in fact, presented evidence from which a jury could infer that he had been harmed. Specifically, Dembinski argued that "the evidence in our case surrounding this issue creates an issue of material fact with respect to whether defendant's disclosure foreclosed Dembinski from other employment, thus causing him economic harm." *See* Petitioner's initial brief before the Eleventh Circuit at 35; *see also* petitioner's reply brief before the Eleventh Circuit at 9-10. He made precisely the same argument before the district court. *See* Petitioner's memorandum in opposition to summary judgment before the district court at 15-17.

Thus, Dembinski did not challenge the injury-in-fact standard in the courts below; rather, he had argued that the evidence he adduced had met that standard. In light of this, the lower courts properly conducted their analysis utilizing the standard presented by the consistent—and only—precedent on the issue; and then applied that standard to the

factual record before them, and found the standard had not been met. As a result, neither the district court nor the court of appeals was called upon by Dembinski to decide the argument made by the Question Presented. Having failed to raise that argument below, this Court should not now consider it. *E.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (refusing to consider argument not raised below); *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982) (same); *Youakin v. Miller*, 425 U.S. 231, 234 (1976) (same).

IV. IN THE ABSENCE OF ANY ARGUMENT FROM PETITIONER BELOW THAT EVIDENCE OF INJURY WAS UNNECESSARY, THE LOWER COURTS CORRECTLY FOLLOWED EXISTING PRECEDENT WHICH WAS THOROUGH, WELL-REASONED AND CONSISTENT WITH THE WELL-ESTABLISHED JURISPRUDENCE RELIED-UPON.

In deciding the claim underlying the Petition, the district court principally relied on the reasoning of the Fifth Circuit in *Armstrong* as support for the proposition that damages liability under 42 U.S.C. § 12112(d) must be based on more than a mere violation of that section, but on some cognizable injury in fact legally and proximately caused by the violation. Pet. App. at 20a. *Armstrong*, in turn, based its reasoning on long-standing precedent from this Court governing the viability of claims for which no relief exists and defining the remedial framework available under the federal employment discrimination laws. *Armstrong*, 141 F.3d at 559-62.

First, the Fifth Circuit in *Armstrong* noted the distinction, pointed out by this Court in *Davis v. Passman*, 442 U.S. 228 (1979), between whether a litigant having a "cause of action" in the abstract versus whether the litigant has stated a claim "upon which relief can be granted" is entitled to pursue his claim. *Armstrong*, 141 F.3d at 559 (citing *Davis*, 442 U.S. at 239). Under *Davis*, where the claimant is not entitled to a

remedy, the claim should be dismissed regardless of whether the claimant has an abstract cause of action. *Davis*, 442 U.S. at 239; *Armstrong*, 141 F.3d at 559. Consequently, the Fifth Circuit went on to determine whether the plaintiff in *Armstrong* would be entitled to any remedy, even assuming *arguendo* that the plaintiff had a right of action and had adequately established a violation of 42 U.S.C. § 12112(d). *Armstrong*, 141 F.3d at 559-60.

As the Fifth Circuit pointed out, "*Albermarle Paper v. Moody*[; 422 U.S. 405 (1975),] remains the seminal case defining the remedies appropriate under Title VII" of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"), and "provide[s] a useful starting point for consideration of the remedial aspects of all federal employment discrimination laws." *Id.* at 560 (citing *Albermarle Paper*, 422 U.S. at 418-19). *Albermarle Paper* established the general rule that federal courts are empowered to craft remedies designed to "make whole" individuals injured by employment discrimination. *Albermarle Paper*, 422 U.S. at 418-19; *Armstrong*, 141 F.3d at 560. The Fifth Circuit then, applying the principles of *Albermarle Paper*, defined its task:

> Under the "make whole" theory, a court's first task is to determine the injuries caused by discrimination that require judicial relief. In other words, the court must ascertain in what way the plaintiff is not whole.

Armstrong, 141 F.3d at 560. The plaintiff in *Armstrong* did not appeal the trial court's ruling that he had not been subjected to any unlawful discrimination flowing from the challenged disclosure (*id.* at 560) and had failed to proffer on appeal any other injury for which he was seeking redress (*id.* at 559). As a result, the Fifth Circuit searched the record in vain for any proof that the plaintiff had suffered "a cognizable and compensable injury arising out of" the alleged violation of 42 U.S.C. § 12112(d). *Id.* at 562.

The Fifth Circuit also specifically rejected the notion that a mere violation of 42 U.S.C. § 12112(d) itself constituted a compensable injury in fact:

> We reject this reading of the provision. This Court has been unable to find any indication either in the text of the ADA or in its legislative history that a violation of the prohibition [of 42 U.S.C. § 12112(d)], in and of itself, was intended to give rise to damages liability. . . . We find this approach to be consonant with the structure of the ADA as well as the principles embodied in the statute.

Armstrong, 141 F.3d at 561. The Fifth Circuit further explained that its holding necessarily followed *Albermarle Paper*'s "make whole" doctrine, stating succinctly, "Armstrong is entitled to no remedy because he has not been injured and has no need of being made 'whole.'" *Id.* at 562 n.20.

In this case, the district court examined the record before it (as had the Fifth Circuit in *Armstrong*) and came to quite the same conclusion with regard to Dembinski (a conclusion affirmed by the court of appeals and not challenged by his Petition). Pet. App. at 21a-22a.

Petitioner cites to a number of cases in an attempt to challenge the propriety of that analysis. Pet. at 16. But those cases are inapposite for a number of reasons, most significant of which is that none of them stands for the proposition that a claimant is entitled to a recovery based on nothing more than a bare statutory violation and in the complete absence of any evidence that the claimant has suffered some remediable harm.

Thus, the district court relied on (and the court of appeals affirmed) the reasoning in *Armstrong*, which was itself based on the well-reasoned application of long-standing and well-established precedent of this Court in *Davis* and *Albermarle*

Paper. And none of the cases cited by petitioner in his attempt to challenge that conclusion calls into question the lower courts' analysis here or creates any tension with the long-standing jurisprudence of this Court relied upon in that analysis.

CONCLUSION

The petition for *writ of certiorari* should be denied.

Respectfully submitted,

W. RUSSELL HAMILTON, III *
CHRISTOPHER P. HAMMON
MORGAN, LEWIS & BOCKIUS LLP
5300 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2339
305.579.0300

* Counsel of Record

Counsel for Respondent Vought Aircraft Industries, Inc.

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APPENDIX

APPENDIX

Applicable Statutory Provision

42 U.S.C. § 12112(d) provides in pertinent part:

(d) Medical examinations and inquiries

...

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related factions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject the requirements of subparagraphs (B) and (C) of paragraph (3).

In turn, 42 U.S.C. §§ 12112(d)(3)(B) and (C) provide:

> (3) Employment entrance examination
>
> A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the result of such examination, if—
>
> ...
>
> (B) information obtained regarding the medical condition or history of the [employee] is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—
>
> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> (iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and
>
> (C) the results of such examinations are used only in accordance with this subchapter.